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No. 23

In the Supreme Court of the United States

October Term, 1948

SOLOMON MICHELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (R. 155-161) is reported at 165 F. 2d 732.

JURISDICTION

The judgment of the court of appeals was entered January 26, 1948 (R. 161-162). The petition for a writ of certiorari was filed February 20, 1948, and was granted April 5, 1948 (R. 163). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925 (now 28 U.S.C. 1254). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, in a trial for bribery of a federal officer, it was error to permit the prosecutor to ask petitioner's reputation witnesses on cross-examination whether they had ever heard that petitioner had been arrested some years previously on a charge of receiving stolen goods.

STATEMENT

Petitioner was indicted in the District Court for the Eastern District of New York on a charge of bribing a federal officer, in violation of Section 39 of the Criminal Code (18 U. S. C. 91). The first count charged that petitioner gave $5,000 to Kratter, an agent of the Bureau of Internal Revenue, with intent to influence Kratter's decision with respect to petitioner's income tax returns; the second count charged the offering of the same bribe (R. 2-3). After a jury trial, petitioner was found guilty on both counts; he was sentenced to 18 months' imprisonment on each count, the terms to run concurrently, and was fined $1 on the first count and $2,500 on the second (R. 144, 151). On appeal, the judgment was affirmed as to the first count, but reversed as to the second on the ground of improper venue since the proof showed the offer to have taken place in the Southern District of New York (R. 155-162).

At the trial petitioner did not dispute the fact that he had paid the $5,000 to Kratter; "the principal and virtually the only issue" was whether petitioner was entrapped by Kratter (Br. 3). In this Court, petitioner does not specifically dispute the legal sufficiency of the evidence on the issue of entrapment; the only question presented here concerns the propriety of the cross-examination of petitioner's reputation witnesses. However, since petitioner claims (Br. 5-6, 18) that the controversy was a close one and that the Government's case was not "strong," and since we on the contrary feel that the alleged error on cross-examination, even if we were to concede it, would be harmless in view of the strength of the Government's case, we shall briefly set forth the evidence in support of the verdict before stating the facts relevant to the cross examination of the reputation witnesses.

1. The evidence for the Government, so far as pertinent to the issue of entrapment, may be summarized as follows:

Kratter, an agent of the Bureau of Internal Revenue, having been assigned to investigate petitioner's income tax returns, first visited the latter's place of business [1] for about 20 minutes in the mid-afternoon of July 16, 1946, and made arrangements with petitioner and his accountant to begin the ex-

[1] Petitioner is a second hand jewelry dealer. He leased two counters in a large store, located at 74 Bowery in the Borough of Manhattan, occupied chiefly by jewelry merchants (R. 26, 71).

amination the following day (R. 6-8, 26, 28). Kratter returned at about 11:00 a. m. on July 17, 1946, and began his investigation of petitioner's records (R. 8, 26-28). He asked petitioner for substantiation of certain cash purchases, cash deposits and checks recorded in the books, but petitioner "could not explain them" (R. 9-10). At about 1:15 p. m. Kratter started out for lunch and petitioner said that he would go along. During the meal petitioner asked what could be done to straighten out his returns; Kratter answered that he would have to complete the investigation before he could say. (R. 10-11, 28-29.) After lunch, despite Kratter's desire to return to his examination of the books, petitioner insisted that they take a walk and discuss the tax returns.[2] During the walk, which lasted an hour, petitioner offered Kratter first $100, then $250, then $300, and finally $800 to fix up the matter so that he would not have to pay too much to the Government. After numerous refusals, Kratter, in order to get back to the store, at last agreed to take $800. (R. 11-12, 30-31.) Soon after they had returned to the store and Kratter had resumed his examination at a desk behind the counter, petitioner dropped a package at his feet saying, "Here is the $800." During the afternoon Kratter again called petitioner's attention to various deposits recorded in the books, but petitioner gave no explanation of

[2] Kratter testified that Internal Revenue Agents never examine books unless the taxpayer or his accountant is present (R. 12, 14).

them. When Kratter completed his examination, at about 4:00 p. m., he picked up the package and handed it to petitioner, telling him he could not take the money. He also told petitioner that the books showed deposits of $35,000 and numerous cash purchases which were unexplained, that it appeared petitioner owed the Government about $25,000, and that he would have to turn the case over to the special agents. Petitioner insisted that Kratter fix things up for him; he detained Kratter in the store, walked down the street with him, refused to leave him, and offered him first $3,000, then $5,000, and said he would pay an additional $5,000 to the Government. Finally Kratter, in order to get away, agreed to take the money. Petitioner said he would call him when he had the money, and asked for Kratter's home telephone number. Kratter then went home without returning to his office. (R. 12-16, 31-35.) On the following morning, July 18, Kratter had an appointment for an examination in another matter, but in the afternoon he returned to his office and reported petitioner's offer to an older agent[3] (R. 17, 36). (Up to this point the Government's case depended upon the uncorroborated evidence of Kratter. In all that follows the Government's version is supported by the testimony of several witnesses.)

[3] Kratter was relatively inexperienced, having been with the Bureau of Internal Revenue for only about six months (R. 5, 40).

On July 19, the day after he had reported the matter, Kratter was taken to see Agent Yung of the Intelligence Unit, and thereafter he acted under Yung's direction (R. 17, 37-38, 57-58). In the evening of that same day, which was a Friday, petitioner called Kratter's home and left a telephone number for Kratter to call. On Monday morning, July 22, Kratter, in Yung's presence, called that number and asked what was wanted; petitioner answered that he was trying to get the money and told Kratter to call him again on Friday. On Friday Kratter called, again in Yung's presence, and petitioner said that he wanted to give him the money. Kratter suggested a meeting in a hotel room, and, when petitioner objected, Kratter told him that he had never wanted to get involved in the matter, that he was taking the money only because petitioner insisted, and that petitioner would have to follow his plan or he would drop the whole thing. (R. 18-22, 38, 58.)

On Monday morning, July 29, Yung, Kratter and four other agents set up a listening device in a room in a Brooklyn hotel; Kratter then called petitioner to tell him where he was and petitioner said he would come right over. When petitioner entered the room he dropped a package containing $5,000 on the dresser. Kratter asked what he wanted done in return for the money. Petitioner replied that he wished Kratter to report $900 owing on his 1942 tax return and $1,200 on his 1943 return. Kratter said, "You understand the only reason I am doing

this is because you insist upon it, isn't that so?" to which petitioner responded, "Yes, that is right." (R. 22-24, 39.) The other agents, having heard the conversation over the listening device in a nearby room, arrested petitioner when he stepped out into the hall (R. 24, 46, 49-55, 58-60, 63). Petitioner admitted to them that he had given the $5,000 to Kratter. When asked for an explanation, he made no accusation against Kratter; he did not protest that he believed he was paying the money to the Government for back taxes; he said only that he would explain to the proper party. Agent Yung then informed him that he was a representative of the Commissioner of Internal Revenue, but petitioner still refused to explain. He was then taken to the office of an Assistant United States Attorney, where he was informed that he need not answer questions and that whatever he said might be used against him, though it might also be used for him. He said nothing to indicate that Kratter had made demands upon him. His only statement was, "Anything I could say would only hurt me." (R. 24, 60-61.)

Petitioner testified in his own behalf that Kratter came to his place of business on the morning of July 15 (R. 71); that after he had been there a short time, he asked petitioner for $800 and said he had enough on petitioner to call in the F. B. I. and have him locked up (R. 73-74); that Kratter continued his threats and raised his demands to $1,000 and then to $5,000 during the walk after

lunch (R. 77-78); that petitioner was frightened (R. 73, 77, 78); that Kratter gave him his home telephone number and told him to call when he had the money (R. 79); that Kratter repeated his threats in the next few days (R. 80-81); and that he finally took the money to Kratter at the hotel (R. 81-82). He admitted that in 1927 in New York City he had pleaded guilty and paid a fine of $100 on a charge of possessing counterfeit watch dials (R. 70; cf. R. 89). On cross-examination he admitted that in 1930 he had signed a second-hand jeweler's license application which contained a denial that he had ever been arrested or summoned for any offense (R. 88-89). His statement that Kratter's first visit occurred on July 15 was corroborated by two defense witnesses, Gerstein and Osterfeld (R. 105, 118).

2. The facts relevant to the cross-examination of the reputation witnesses may be summarized as follows:

After petitioner had left the stand, defense counsel introduced five reputation witnesses. All of them had known petitioner for at least 15 years, and two had been acquainted with him for about 30 years. Three of these witnesses testified that petitioner's reputation for honesty and truthfulness was excellent; the other two said that they had never heard anything derogatory about him. Four of them were asked on cross-examination whether they had ever heard that petitioner had been convicted in 1927 on the counterfeit watch dial charge

and sentenced to pay $100 or spend 30 days in jail. They were also asked, and this is the question of which petitioner is now complaining, whether they had ever heard that he had been arrested in New York City in 1920 on a charge of receiving stolen goods; all four denied having heard of this charge. (R. 111-117, 123-124.) When the question as to the arrest was first asked, the court instructed the jury as follows (R. 113):

> * * * I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation of the defendant is being tested. Is that clear?

After the question had been asked of a second witness, the court said (R. 116):

> Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue. Now would you base your decision on the case fairly in spite of the fact

that that question has been asked? You would? All right.

And in its final charge to the jury, the court reiterated the same warning (R. 137):

> In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods: I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses.

Furthermore, the court required of the prosecutor, as proof of his good faith in having asked the question, assurance that it had basis in fact. As evidence of this the prosecutor submitted a photostatic copy of the 1930 license application containing a notation of the 1920 arrest. (R. 130-131; see Government's Exhibit 6.)[4]

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[4] Government's Exhibit 6 was not introduced in evidence, but was merely marked for identification. It was not included in the record forwarded to the circuit court of appeals. We

SUMMARY OF ARGUMENT

"If the prisoner, having a bad character, misleads the Court by calling witnesses to say that he has a good one, in the interests of truth and justice the false impression should be removed." Erle, C. J., in *Regina* v. *Rowton*, Le. & Ca. 520, 533. Since the early part of the nineteenth century the courts have, almost unanimously, permitted the prosecution, as one method of removing the false impression, to ask reputation witnesses whether they have ever heard rumors of certain specific conduct of the defendant inconsistent with the reputation ascribed to him. The object is not to prove the truth of the derogatory rumor but to prove that the asserted reputation is not consistent with the witness' knowledge of a derogatory rumor. The contrary Illinois decisions rest upon the mistaken assumption that the object is to prove bad character by proving the truth of specific bad acts.

The scope of such cross-examination rests within the discretion of the trial court, but because of the obvious possibilities of abuse the asking of the questions should be strictly supervised. Here, where the reputation witnesses were asked whether they had heard that petitioner has been arrested in 1920 for receiving stolen goods, the court required of the prosecutor a showing that the cross-examination had a basis in petitioner's past, and carefully and repeatedly instructed the jury as to

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have, therefore, obtained the exhibit and have lodged it with the Clerk of this Court.

the purpose for which the question could be considered. We submit that the question was relevant on the issue of the witnesses' knowledge of the petitioner's reputation, and that the court did not exceed the bounds of its discretion in permitting it to be asked.

Even conceding *arguendo* that the ruling was erroneous, we do not think that the asking of the question can have had any effect upon petitioner's substantial rights. He had already admitted to the jury that he had bribed Kratter, that he had previously been convicted of another offense reflecting upon his honesty, and that he had filed a false license application. Consequently, the effect of this question upon the jury's opinion of his reputation must have been negligible. Furthermore, on the issue of entrapment, petitioner's only real defense, the great weight of the evidence is against him.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN PERMITTING THE REPUTATION WITNESSES TO BE ASKED ON CROSS-EXAMINATION WHETHER THEY HAD EVER HEARD THAT PETITIONER HAD BEEN ARRESTED IN 1920

The issue here presented is an extremely narrow one, involving only one small aspect of the very considerable field of character evidence. The defendant in a criminal trial may offer proof that his character is such as to render it highly improbable that he committed the alleged offense. This he

may do through witnesses who testify that his reputation with respect to the pertinent trait of character is excellent. We are here concerned only with the extent to which such witnesses may be cross-examined as to their knowledge of rumors or charges attributing certain specific acts of misconduct to the defendant. The issue is simply the extent to which the prosecution in a federal criminal case should be permitted to test the basis for a reputation witness' testimony by asking him whether he has heard certain rumors or charges inconsistent with the reputation he has ascribed to the defendant, and whether the question asked in the instant case exceeded the bounds of the court's discretion.

One important source of confusion should be noted at the outset. All the prosecution seeks to do by such cross-examination is to establish whether the witness has *heard* a derogatory rumor. It does not seek to establish the *truth* of the rumored misconduct. By offering reputation witnesses the defendant makes his reputation an issue. Such testimony is calculated to support the double inference that since his reputation is excellent, his character, i.e., his moral disposition, must also be excellent; and that since his character is excellent, it is highly improbable that he committed the alleged offense. By cross-examination of the sort we have here the prosecution endeavors to undermine the foundation of these inferences by showing that the witnesses who testified that the defendant's

reputation is blameless are actually aware of certain derogatory public reports. But the witnesses are not asked whether there is any truth in the reports. The sole issue at this point is the defendant's reputation. Consequently such cross-examination does not conflict with that "general and absolute rule of exclusion" [5] which forbids resort to *proof* of particular bad acts to show that the defendant does not have the good character he affirms.

A. THE RULE PERMITTING SUCH CROSS-EXAMINATION IS SUPPORTED BY LOGIC, BY AN UNBROKEN LINE OF AUTHORITY IN THE FEDERAL COURTS, AND BY THE VAST MAJORITY OF DECISIONS IN THE STATE COURTS.

1. *The historical and logical bases for the rule.*— When the defendant in a criminal case chooses to support his alleged innocence of the offense charged by producing reputation witnesses, Wigmore, summarizing the authorities, states that it is almost universally permitted to the prosecution to probe the asserted reputation by asking the witnesses whether they have heard certain derogatory rumors concerning the defendant. 3 Wigmore, *Evidence* (3rd ed. 1940), § 988. The origin of the rule permitting such cross-examination is obscure. It seems to have developed in the late eighteenth or early nineteenth century as a logical consequence of the right finally accorded criminal defendants of presenting sworn witnesses, including, of course, reputation witnesses, in their own behalf.

[5] 1 Wigmore, *Evidence* (3rd ed. 1940), § 193.

In the history of the common law the rules of character evidence have undergone metamorphosis. Today we regard it as one of the distinctive features of the common law that the defendant's character, good or bad, is not a factor to be considered in determining guilt unless he shall have first opened the issue himself; and even then, the evidence is confined to the defendant's reputation, particular acts and individual opinions being excluded.[6] But this has not always been the rule. In the early stages of the common law, when the jury functioned chiefly as a body of witnesses and when its members were specifically chosen because they were neighbors of the defendant and supposedly knew the truth as to the accusation, such evidence must frequently have played an important part in the decision.[7] When in later days the jury had attained its present status as judge of the evidence, the prosecution was permitted to show the defendant's evil character and even his particular bad acts,[8] but the defendant himself, by reason of the prohibition against witnesses for the defense, was deprived of the right to offer proof of good charac-

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[6] *Josey* v. *United States*, 135 F. 2d 809, 811 (App. D.C.); see also 1 Wigmore, *Evidence* (3rd ed. 1940), §§ 56, 57, 58, 193, 195. Of course, all such evidence is clearly relevant to show character, and it is freely used in criminal trials on the continent today. 1 Wigmore, *Evidence* (3rd ed. 1940), § 193. But in the common law system all evidence of particular offenses is now excluded because, as Wigmore says, its tendency is to prove too much. 1 Wigmore, *Evidence* (3rd ed. 1940), § 194.

[7] See 1 Stephen, *History of the Criminal Law of England* (1883), pp. 254-260, 449.

[8] 1 Wigmore, *Evidence* (3rd ed. 1940), § 194.

ter.[9] In the decades following 1680, roughly speaking, several changes seem to have taken place which gave to the common law of character evidence the shape it bears today. The defendant gained the right to present sworn witnesses in his own behalf;[10] the prosecution lost the right to give evidence of the defendant's particular bad acts;[11] the defendant was allowed to offer evidence of his good reputation, at first only in capital cases, but later in any criminal case;[12] and, finally, the prosecution was prohibited from presenting evidence of the defendant's character until he had opened up the subject himself, and was restricted solely to rebuttal by evidence of the defendant's bad general reputation.[13]

We think it clear, then, that the rule permitting the prosecution to test the accuracy of the knowledge of the defendant's reputation witnesses has arisen in comparatively recent times as a logical consequence of this change in the law of character evidence. The weights in the scales of character evidence have been shifted sharply in favor of the defendant. He may now rely on his good reputation as showing the improbability of guilt. What

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[9] 1 Stephen, *History of the Criminal Law of England* (1883), pp. 350-354.

[10] 1 Stephen, *History of the Criminal Law of England* (1883), pp. 416-417.

[11] 1 Wigmore, *Evidence* (3rd ed. 1940), §194.

[12] 1 Stephen, *History of the Criminal Law of England* (1883), p. 449; 1 Wigmore, *Evidence* (3rd ed. 1940), §56.

[13] 1 Wigmore, *Evidence* (3rd ed. 1940), §57; *Regina* v. *Rowton*, Le. & Ca. 520.

the reputation witnesses in effect declare is that the general and unqualified concensus in the community is that the defendant's reputation is good i.e., "either (a) that the testifier has never heard any ill spoken of the other or (b) that the sum of the expressed opinion of him is favorable." 3 Wigmore, *Evidence* (3rd ed. 1940), § 988. But "the admission of testimony of good reputation is of doubtful value and often deceptive where there is not applied to it the acid test of cross-examination to prove the accuracy of the testimony and the standard by which the witness measures reputation." *Commonwealth* v. *Becker*, 326 Pa. 105, 115, 191 A. 351, 356. The need for such a rule is manifest, for "if the prisoner, having a bad character, misleads the Court by calling witnesses to say that he has a good one, in the interests of truth and justice the false impression should be removed." Erle, C. J., in *Regina* v. *Rowton*, Le. & Ca. 520, 533. Consequently, as Wigmore points out, the courts have almost universally permitted the prosecution to ask such witnesses on cross-examination whether they have heard [14] rumors of certain specific past misconduct on the part of the defendant. The rationale of the rule rests in this, that the word of a witness who has testified that the defendant's repu-

[14] Thus the proper form of question to be put to the witness is, "Have you ever heard * * *?" It is improper to ask the witness, "Do you know * * *?" *Stewart* v. *United States*, 104 F. 2d 234 (App. D.C.). And it is improper to state the question hypothetically, "Would your opinion still be the same if you heard * * *?" Cf. *Little* v. *United States*, 93 F. 2d 401 (C.C.A. 8), certiorari denied, 303 U. S. 644.

tation is good, or that he has never heard ill of him, will be weakened or destroyed in the minds of the jury if he admits knowledge of derogatory rumors.

Keeping in mind the distinction noted above (*supra*, p. 13), i.e., that what is involved in such cross-examination is merely the *hearing*, and not the *truth*, of the derogatory rumors, we find that the rule works no undue hardship upon the defendant, so long as the questions are strictly supervised by the court. The defendant's reputation, though relevant, does not become an issue unless he injects it into the case himself. He does so in the hope of building upon the testimony of his reputation witnesses the double inference of good character and improbability of guilt. If the witnesses testify that they have never heard anything against the defendant, and yet they admit upon cross-examination to having heard derogatory rumors, their assertions are obviously inaccurate and discredited. If the witnesses testify positively that the defendant's reputation is good, but admit knowledge of derogatory rumors, the standards by which they judge reputation will appear suspect. Of course, to obviate abuse, the asking of such questions should be strictly supervised by the trial court. The defendant is protected by the court's strict refusal to permit such questions except upon a showing by the prosecutor that they are asked in good faith, and not for mere purposes of innuendo, and by the court's instruction to the jury that there

is no proof of the truth of the rumors, that they constitute no evidence of guilt, and that they are to be used only to test the accuracy or probative value of the evidence as to the defendant's reputation. See 3 Wigmore, *Evidence* (3rd ed. 1940), § 988.[15]

2. *The state of the authorities.*—The earliest recorded cases permitting such cross-examination of reputation witnesses appear to be *Rex* v. *Hodgkiss*, 7 C. & P. 298 (1836), and *Regina* v. *Wood*, 5 Jur. 225 (1841). The reports of these two cases are meager and not of much value, except that by the casual manner of their treatment they indicate an already well-established rule.[16]

The circuit courts of appeals have, without exception, held that when the accused puts his reputation in issue, the witnesses may be asked on cross-examination whether they have heard of specific charges, or rumors, of other misconduct on the

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[15] Furthermore, the witness may, if necessary, give on redirect examination a fuller explanation of the content of the rumor, i.e., of what is publicly said, though he may not go into the matter of the truth of the rumor. *State* v. *Doris*, 51 Ore. 136, 160-161, 94 P. 44, 51-52. And cf. *Sullivan* v. *United States*, 75 F. 2d 622 (C.C.A. 9), certiorari denied, 295 U. S. 757.

[16] The practice seems to be rare in English trials. Stone, *Cross-examination by the Prosecution at Common Law and under the Criminal Evidence Act*, 51 L.Q.R. 443, 458-459. Perhaps the reason may be that, as stated in *Regina* v. *Rowton*, Le. & Ca. 520, 529, 538, the prosecution usually issues a warning beforehand if it is able to rebut character evidence. As a result of the adoption of the Criminal Evidence Act in 1898, the common law rules governing character evidence seem to have been enlarged to permit reputation witnesses to be asked as to the fact, and not merely as to the rumor, of the defendant's past bad acts. Stone, *supra*, at 462, 459; cf. *Rex* v. *Waldman*, 24 Cr. App. R. 204 (1934).

part of the accused. The earliest case appears to be *Jung Quey* v. *United States*, 222 Fed. 766 (C.C.A. 9), decided in 1915. See also *Josey* v. *United States*, 135 F. 2d 809, 811 (App. D. C.); *United States* v. *Commerford*, 64 F. 2d 28, 30-31 (C.C.A. 2), certiorari denied, 289 U. S. 759; *Chiccarello* v. *United States*, 68 F. 2d 315 (C.C.A. 3); *Mannix* v. *United States*, 140 F. 2d 250, 252 (C.C.A. 4); *Proctor* v. *United States*, 100 F. 2d 350 (C.C.A. 5); *Lawrence* v. *United States*, 56 F. 2d 555, 556 (C.C.A. 7), certiorari denied, 286 U. S. 565; *Spalitto* v. *United States*, 39 F. 2d 782, 785-787 (C.C.A. 8); *Mitrovich* v. *United States*, 15 F. 2d 163, 164 (C.C.A. 9); *McBoyle* v. *United States*, 43 F. 2d 273, 275 (C.C.A. 10), reversed on other grounds, 283 U. S. 25.

Although there are occasional aberrant decisions resulting from a misunderstanding of the purpose of the rule, the overwhelming majority of the state courts permit such cross-examination. The cases have been collected and summarized exhaustively in Professor Wigmore's work[17] and in a Note at 71 A.L.R. 1504. Early decisions to the contrary in Florida and Nebraska have been overruled. In North Carolina the law still seems to be in some doubt.

The supposed Illinois rule, to which petitioner refers (Br. 15-17), arose from the confusion which we have already noted, namely, the failure to dis-

[17] 3 Wigmore, *Evidence* (3rd ed. 1940), § 988, fn. 1.

tinguish between proof of the *hearing* of a rumor and proof of the *truth* of the rumor. Thus in *Aiken* v. *People*, 183 Ill. 215; 55 N. E. 695, a reputation witness was asked on cross-examination whether he had heard certain derogatory rumors. The Supreme Court of Illinois held the allowance of the question erroneous. But the authorities relied upon by the court are those which prohibit the prosecution from proving the truth of specific acts of misconduct on the part of the defendant. The above cited A.L.R. note calls attention to this inconsistency, and Wigmore criticises the decision as "misconceiving the nature of the problem and citing none of the cases pertinent." In the latest case on the subject in that state, the Supreme Court of Illinois took note of the fact that the *Aiken* decision was contrary to the great weight of authority. *People* v. *Hannon*, 384 Ill. 206, 44 N. E. 2d 923. This may be an indication that Illinois will abandon its solitary position at the earliest opportunity. In the *Hannon* case it was not necessary to decide the point. The prosecutor's questions were held erroneous because they sought to determine the reputation witness' knowledge of the fact, and not of the rumor, and because the acts inquired about were not connected with the specific trait of character involved in the alleged offense.[18]

[18] The author of the opinion in the court below, referring to the *Hannon* and *Aiken* cases, appended a footnote (R. 159-161) to the effect that questions of the type involved in this case

3. *Wigmore's criticism of the rule.*—Petitioner refers to Wigmore's criticism of the rule (Br. 9, 13-19, 16). We do not deny the difficulty in maintaining in the minds of the jury the distinction between a character witness's knowledge or lack of knowledge of a rumor of misconduct as affecting the credibility of testimony on reputation, and the use of such evidence so as to violate the rule against evidence of particular bad acts. Nor do we deny the possibility of abuse by counsel who may not act in good faith in making the inquiry. But Wigmore himself points out both the necessity and the value of this method of testing the reputation witnesses' testimony. He states that such inquiry is almost universally permitted, and a careful reading of his text makes manifest that he condemns the prac-

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ought to be excluded "unless they relate to offenses similar to those for which the defendant is on trial." This appears to be a further confusion of the present rule with that other rule which prohibits proof of similar crimes of the defendant except on the issue of intent. Here the issue is reputation, not intent. We think it clear that all derogatory rumors which are current as to a man's past are relevant to the issue of his reputation, though they may have no relevance to prove his intent in committing the particular offense alleged. We submit that Judge Frank's suggested limitation is, therefore, inconsistent with the very purpose of the rule, which is to permit a testing of the reputation witnesses' testimony on as broad a basis as that which the witnesses have asserted, i.e., that the general concensus of opinion of the defendant's reputation is good or that the witnesses have never heard any evil report.

Of course, it has always been the law that, just as the reputation witnesses must be limited in their testimony to the specific trait of character involved in the accusation, 1 Wigmore, *Evidence* (3rd ed. 1940), §59; *Morris* v. *District of Columbia*, 124 F. 2d 284 (App. D.C.), so also the cross-examination must be limited to charges or rumors of offenses involving conduct inconsistent with that trait. *Josey* v. *United States*, *supra*.

tice only when it is not "strictly supervised by forbidding it to counsel who do not use it in good faith." 3 Wigmore, *Evidence* (3rd ed. 1940), § 988.

We think we have sufficiently demonstrated that the rule allowing such cross-examination is supported by logic and by the well-nigh unanimous stand of the authorities. It remains to be considered whether the particular question asked in this case was proper, or whether the court misapplied the rule, failed to exercise the strict supervision required of it, and abused its discretion in allowing the question.

B. THERE WAS NEITHER ERROR NOR ABUSE OF DISCRETION IN THE TRIAL COURT'S APPLICATION OF THE RULE.

Petitioner urges that the trial court misapplied the rule. It is contended that the court deemed itself bound to permit the questions, whereas the authorities hold that such questions may be excluded in the court's discretion (Br. 10). In other words, it is alleged that the court failed to exercise its discretionary power. We find nothing in the record to indicate that the court felt bound to allow the questions. On the contrary, the trial judge was clearly aware that he had the power to exclude the questions, for as we noted above (*supra*, p. 10), he required the prosecutor to show that they were based on fact, and he specifically stated that he was following Wigmore's suggestion that the asking of such questions be strictly supervised (R.

130-131). Furthermore, defense counsel did not at the trial object that the questions should be excluded as a matter of discretion. His contention was that they should be excluded absolutely. Thus, the second time the question was asked, the following colloquy appears (R. 115-116):

> Mr. CASTELLANO. I renew the objection on the ground that it is irrelevant.
>
> The COURT. Yes, but the cases specifically cover that situation.
>
> Mr. CASTELLANO. I am familiar with those cases relating to convictions.
>
> The COURT. No, Mr. Castellano: I am talking about the cross-examination of a character witness. I am wondering whether you had any special point about it, because the cases seem quite clear.
>
> Mr. CASTELLANO. All right.
>
> The COURT. Have you any special point aside from the question of direct proof in order to impeach a person's character that you may not prove an arrest? Are you applying that law to this?
>
> Mr. CASTELLANO. That is right.
>
> The COURT. Well then, I overrule your objection on that with an exception to you.
>
> Mr. CASTELLANO. Yes.

It is apparent that defense counsel was thinking of the rule which prohibits impeachment of a witness' character for truthfulness by cross-examination as to acts of misconduct not followed by conviction. *Little* v. *United States*, 93 F. 2d 401, 408

(C.C.A. 8), certiorari denied, 303 U. S. 644. Consequently, exclusion on discretionary grounds was never actually requested of the trial court.

But we do not think the ruling could be termed abusive, even if there had been a proper appeal to the court's discretion. Various aspects of the question must be considered: the basis and the form of the question, the nature, the place and the time of the rumored offense, and the type of action, if any, taken by the authorities. As we have seen, the prosecutor established a foundation by producing the copy of the license application containing the notation of petitioner's arrest (*supra*, p. 10). The form of the questions was proper. The witnesses were asked, not "Do you know?", but "Did you ever hear?"—thus the evidence sought related to the hearing, not to the truth, of the rumor. The place of the rumored misconduct was New York City, which was also the location of the asserted reputation. And the nature of the misconduct, receiving stolen goods, was clearly relevant to petitioner's honesty, the trait of character involved in a trial for bribery. The dispute here is whether the trial court erred or abused its discretion in permitting cross-examination as to a mere arrest which was quite remote in time.

Petitioner's chief contention now is that the prosecution should be forbidden to ask the reputation witnesses whether they have heard rumors of arrests which did not result in convictions (Br. 8-9, 11-13, 14, 17). It appears to have been un-

questioned until now that the rumor of a mere arrest on a prior charge involving the pertinent moral trait might be used in testing the accuracy of the asserted reputation. See, e.g., *Stewart* v. *United States*, 104 F. 2d 234 (App. D.C.); *Spalitto* v. *United States*, 39 F. 2d 782, 785 (C.C.A. 8); *Clark* v. *United States*, 23 F. 2d 335 (App. D.C.); *Filippelli* v. *United States*, 6 F. 2d 124, 125 (C.C.A. 9); *People* v. *Moran*, 144 Cal. 48, 62, 77 P. 777, 783; *Randall* v. *State*, 132 Ind. 539, 542, 32 N. E. 305, 306; *State* v. *McDonald*, 57 Kan. 537, 539, 46 P. 966, 967; *State* v. *Oteri*, 128 La. 939, 947, 55 So. 582, 585; *State* v. *Finkelstein*, 213 S. W. 465, 467 (Mo.). Petitioner refers to no authority to the contrary. Wigmore, in the section cited in petitioner's brief (Br. 9), and the cases cited by petitioner (Br. 14) are referring to the rule which forbids *impeachment of the character of a witness* by questions as to a mere arrest. The reason for that rule is that the mere fact of having been arrested does not in itself indicate a defect in *character*. But, to repeat, the issue here is *reputation*, and an arrest for an offense involving moral turpitude may of course, even though unjustified, be damaging to reputation, for the general public knows that arrests are not normally made without some cause. The general concensus of opinion as to the arrested person's reputation will be lowered somewhat unless, and until, the arrest is satisfactorily explained. The civil courts have recognized the validity of this reasoning, for damage to

reputation is one of the elements to be considered in measuring the compensation to be awarded for false imprisonment. *Beckwith* v. *Bean*, 98 U. S. 266, 276. And printing a baseless report of an arrest is libelous. *Washington Post Co.* v. *Kelly*, 38 F. 2d 151 (App. D.C.). Since we are concerned here only with whether the witnesses have accurately portrayed the defendant's reputation, reports of his arrest seem clearly to have relevance. The jury had the right to know whether the witnesses, who testified that petitioner's reputation was, in general, good, knew of the rumor of his arrest and had taken it into consideration in forming their estimate of his reputation.

Nor do we think that the mere fact that the arrest occurred in 1920, twenty-six years before the present trial, called for the exclusion of the prosecutor's question. It is true that the character with which we are concerned is the defendant's character at the time of the alleged offense; but not only present, but even past, reputation has relevance to establish present character. 3 and 5 Wigmore, *Evidence* (3rd ed. 1940), §§927, 1617. Furthermore, a man's present reputation is made up of opinions, stories and tales, discussed for years by those who know him best, and it should not be presumed that early errors or acts indicating honesty are forgotten and no longer remembered either to his credit or discredit, as the case may be. There seems to be very little authority on this point. Most reported cases simply state that the reputation witnesses

were cross-examined as to the defendant's "previous" misconduct without indication as to whether it was recent or not. There are many cases holding that a defendant who takes the stand, or any witness for that matter, may not be impeached by questions as to discreditable incidents which are remote in time. The reasons usually given are that it is unfair to the witness to require him to defend his whole past and that to permit such questions would raise too many collateral issues. See *People* v. *Willy*, 301 Ill. 307, 133 N. E. 859, and cases there cited. But where, as here, the object of the question is not to impeach the character of the witness but to test the basis for the reputation alleged to be possessed by the defendant, these difficulties do not seem to be present. In *State* v. *Willard*, 192 S. W. 437, 440 (Mo.), the Supreme Court of Missouri held that it would be error to permit cross-examination as to a crime committed fifteen years previously unless that act was shown to be so linked with other bad acts in point of time as to leave no space for repentance. The court seemed to think that the lapse of time gave rise to a presumption of reformation. The point of the cross-examination, however, is not to determine what the defendant's character may be, but whether his past misdeeds still cloud his reputation. The case has been criticized as unsound by Wigmore,[19] and it has in effect been overruled

[19] 3 Wigmore, *Evidence* (3rd ed. 1940), § 988, footnote 1, at p. 622.

in *State* v. *Parker*, 321 Mo. 553, 560-561, 12 S. W. 2d 428, 431, in which the defendant's reputation witnesses were permitted to be asked whether they had heard that he had married a notorious prostitute 30 years previously. And in *Stinson* v. *State*, 120 Tex. Cr. 456, 461, 49 S. W. 2d 468, 470-471, it was held that, whereas when the defendant himself is on the stand and the prosecution attacks his character as a witness, cross-examination as to his previous offenses should be limited to those occurring within seven years of the trial, no such limitation applied to cross-examination of reputation witnesses.[20]

Furthermore, even under the rule of the *Willard* case, there was evidence here to indicate that no reformation had taken place. This was not a mere youthful indiscretion or a totally isolated shadow on petitioner's reputation for honesty. He was about 30 years of age in 1920 and had already been engaged in the second-hand jewelry business for

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[20] The only one of the cases cited by petitioner (Br. 13) which is strictly in point is *State* v. *Bell*, 206 Ia. 816, 221 N.W. 521, in which cross-examination as to offenses committed 12 and 8 years prior to trial was excluded because the witnesses were questioned as to their knowledge of the fact, not of the rumors. The court added as an afterthought that the prior offenses were too remote anyway. In *Sloan* v. *United States*, 31 F. 2d 902, 906 (C. C. A. 8), the misconduct inquired about had occurred *after* the offense for which the defendant was being tried. *People* v. *Willy*, 301 Ill. 307, 133 N.E. 859, was concerned with rebuttal testimony by prosecution witnesses, not with cross-examination of the defendant's reputation witnesses. *Burnett* v. *State*, 34 Ariz. 129, 268 P. 611, was a homicide case in which the state offered evidence of the peaceful character of the deceased, which was objected to as too remote.

several years (R. 68-69). He admitted that in 1927 he had been convicted and fined for possession of counterfeit watch dials (R. 70). He admitted that a license application signed by him in 1930 contained a denial that he had ever been arrested or summoned to court (R. 88-89). And he admitted having entered into the corrupt bargain with Kratter (R. 77, 82, 83).

It is, of course, settled that the scope of cross-examination is a matter which rests within the sound discretion of the trial court (*Glasser* v. *United States*, 315 U. S. 60, 83; *Alford* v. *United States*, 282 U. S. 687, 694); and this rule has frequently been applied to cross-examination of reputation witnesses in respect of derogatory reports. *Mannix* v. *United States*, 140 F. 2d 250 (C.C.A. 8); and see cases collected in Note, 71 A.L.R. 1504, 1519. Petitioner chose to make an issue of his reputation for business honesty. His own admissions cast doubt upon the validity of the reputation given him by the witnesses. We think the court was within the allowable scope of its discretionary powers in permitting the witnesses to be examined as to whether their estimates took into consideration the 1920 arrest. Certainly, in view of the decision of the court below, it can scarcely be said that reasonable men could not differ as to the propriety of the action taken by the trial court. See *Delno* v. *Market Street Ry. Co.*, 124 F. 2d 965, 967 (C.C.A. 9).

II

EVEN ON THE SUPPOSITION THAT CROSS-EXAMINATION WAS ERRONEOUS, PETITIONER'S SUBSTANTIAL RIGHTS WERE NOT AFFECTED

Finally, even conceding *arguendo* that the ruling of the trial court was erroneous, we do not believe this would require a reversal of petitioner's conviction. As this Court recently pointed out in interpreting the "harmless error" statute,[21] the prejudicial effect of an alleged error in a criminal trial cannot be judged *in vacuo* but must be determined with reference to the case as a whole. The question is "what effect the error had or reasonably may be taken to have had upon the jury's decision. * * * If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand * * *." *Kotteakos v. United States*, 328 U. S. 750, 764. In our opinion the alleged error in no way affected petitioner's substantial rights.

It has frequently been held that where, as here (*supra*, p. 9), the reputation witness answers the questions as to rumors in the negative, an error in asking the question, unaccompanied by circumstances which show that the prosecutor was acting in bad faith, is purely technical and causes no substantial damage. *Little v. United States*, 93 F. 2d

[21] 28 U.S.C. 391; see also Rule 52(a), Federal Rules of Criminal Procedure.

401, 408 (C.C.A. 8), certiorari denied, 303 U. S. 644; *Reuben* v. *United States*, 86 F. 2d 464, 467-468 (C.C.A. 7), certiorari denied, 300 U. S. 671; *Proctor* v. *United States*, *supra*; *Jung Quey* v. *United States*, *supra*; and see cases collected in Note, 71 A.L.R. 1504, 1539-1540.

The only effect which the cross-examination could have had upon the minds of the jury here would have been to shake their confidence in the good reputation ascribed to petitioner by his witnesses, for they were told three times that this was the only purpose for which they could consider the questions (*supra*, pp. 9-10). But by the time these witnesses began to appear in the box the jury already knew, from petitioner's own admissions, that he had been convicted in 1927, that he had submitted a license application in 1930 containing a false statement, and that he had given Kratter $5,000 in order to prevent Kratter from reporting him to Federal authorities. In view of all these antecedent destructive admissions, we do not see how the mere intimation of an arrest, unconfirmed by any witness, can have had any appreciable effect upon the jury's opinion as to petitioner's reputation. In their minds the testimony of the reputation witnesses must already have been discounted.

Furthermore, we submit that on the crucial issue in the case, i.e., whether the criminal design originated with petitioner or with Kratter, the great weight of the evidence is against petitioner. The

Government's evidence, countered only weakly by petitioner, shows that the conduct of both Kratter and petitioner, subsequent to Kratter's report of the matter to his superior, was totally inconsistent with petitioner's contention that Kratter was the extortioner and petitioner the pursued. Thus when Kratter, in the presence of his superior, called petitioner on July 26, 1946, he told petitioner that he was taking the money only because petitioner insisted, that he had never wanted to get involved in such a matter, and that he would drop the whole thing if petitioner did not come to the hotel (R. 21-22). If petitioner had then protested against this statement of the situation he would undoubtedly have testified to that effect when he took the stand. Then again the agent who took notes of the interview between Kratter and petitioner in the hotel room testified, with the corroboration of three other agents, that the following exchange took place (R. 54; see also R. 24, 59, 63):

> KRATTER. You insisted that I do something.
>
> MICHELSON. Yes.
>
> KRATTER. And in fact you wouldn't let me go unless I promised.
>
> MICHELSON. Well, naturally.
>
> KRATTER. I tried to get away from you—I wouldn't touch it—I wouldn't handle it, but I figured I would work with you. On what you want to pay in excess of the sum—whatever you set it's got to be, but you set the figure.
>
> MICHELSON. Certainly. I figured we should

> make it like it's for both years. This is separate, only you should make it $1,200, and the other year $900—that would be very fair.

And, finally, when petitioner was arrested he was given ample opportunity to explain. But he made no accusation against Kratter, nor did he say anything to indicate that he thought he was paying the $5,000 to the Government. The only thing he could say was, "Anything I could say would only hurt me" (R. 24, 60-61).

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the circuit court of appeals should be affirmed.

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OCTOBER 1948.

U. S. GOVERNMENT PRINTING OFFICE 1948 908917 182